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The Scope Of 'Adverse Employment Action'

Law360, New York (December 15, 2009) -- Title VII of the 1964 Civil Rights Act ("Title VII"), and the Age Discrimination in Employment Act of 1967, prohibit an employer from discriminating in the terms and conditions of employment on the basis of a person's gender, age, race, religion, nationality, etc.

This prohibition has, of course, always included the acts of hiring and firing, as well as acts committed during the course of the employee's tenure.

But does the prohibition against discrimination cover an employee who claims age and gender discrimination because her employment contract has not been renewed?

Put another way, does nonrenewal of an employment contract constitute an "adverse employment action," which is a necessary element of a discrimination claim?

A number of courts have already answered that question, but only recently the influential federal Second Circuit Court of Appeals in New York (in Leibowitz v. Cornell University) joined five other federal circuit courts in holding that nonrenewal of an employment contract may constitute discrimination, because the act of nonrenewal is an "adverse employment action."

A quick review of the venerable McDonnell Douglas burden-shifting framework will provide a short grounding in this area.

Under McDonnell Douglas, 411 U.S. 792, 93 S.Ct. 1817 (1973), to establish a prima facie case of discrimination, an employee must show that:

1) she is a member of a protected class;

2) she is qualified for the position or has satisfactorily performed the job;

3) she was subject to an adverse employment action, which

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4) occurred under circumstances giving rise to an inference of discrimination.

This evaluation is used for both Title VII and ADEA cases.

In Leibowitz, plaintiff was employed by defendant as a senior extension associate for a series of renewable five-year contractual periods. She was ultimately terminated from this nontenured position and sued defendant under Title VII and the ADEA (as well as state and local laws), claiming that age and gender discrimination motivated the non-renewal of her contract.

The employer moved for summary judgment, contending, among other things, that the contract nonrenewal was not an "adverse employment action," since plaintiff "did not have a guarantee of lifetime employment" in this nontenured position.

The employer argued that absent a showing that she held a tenured position, the mere nonrenewal of plaintiff's contract was not an adverse action.

"Such is not the case," responded the Court of Appeals, reversing the dismissal of plaintiff's case. Although it had not dealt with this issue before, the court mentioned that other federal courts of appeal had held similarly.

As to whether plaintiff was subject to an "adverse employment action," the court discussed that under both statutes an adverse action can include termination or less severe acts "unique to a particular situation," such as, by way of example, demotion, decreased wages, significantly diminished material responsibilities, material loss of benefits, or a lower job title — even reassignment to a less desirable position suffices.

The court started its analysis of the case by restating the obvious — that an employer may not discriminate in hiring on the basis of age or gender.

Citing one of its previous decisions, the court noted that it had already ruled that termination followed by rehiring to a lesser position is an adverse action, since an employer cannot be permitted "to do through layoff and rehiring" what it could not do during the course of employment.

From these two premises, the court needed to take a small step to determine that if an employer cannot discriminate in hiring and cannot "do through layoff and rehiring" what it may not do during the course of employment, then it cannot discriminate by failing to renew an employment contract. The court held that:

"[w]ere we to accept [the employer's] argument here, we would effectively rule that current employees seeking a renewal of an employment contract are not entitled to the same statutory protections under the discrimination laws as prospective employees. ... [w]e decline to adopt that flawed legal analysis. ... An employee seeking a renewal of an employment contract, just like a new applicant or a rehire after a layoff, suffers an adverse action when an employment opportunity is denied ... [and] [t]he mere fact that

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the employer's decision not to renew is completely discretionary does not mean that it is not an 'adverse' employment decision."

After ruling on this point of law, the court remanded the case back to the trial court to determine whether or not there was, indeed, discrimination, as plaintiff alleged.

What does this decision mean to an employer, beyond the simple (but important) holding of this case? It seems that courts of appeal are reversing grants of summary judgment in favor of an employer with increasing frequency, and to the chagrin of employers. Perhaps this is a result of the change in the political climate, the economy, or both.

In any case, the halcyon days of summary dismissal may have already reached their high-water mark, and an employer should recognize that the courts may be pushing to expand the coverage of the antidiscrimination laws, potentially being followed shortly by similar congressional action.

If this is indeed the case, the conclusion is ineluctable (given this seeming expansion of employee rights), that an employer must dust off, review or revise, and vigorously enforce its antidiscrimination policies and practices. The employee manual should be updated, and management (as well as the work force) should be trained accordingly.

The Leibowitz case dealt only with the third prong of the McDonnell Douglas analysis, and an employer must now recognize and understand the full scope of what is considered an "adverse action," without forgetting the other three analytical prongs.

The employer should be cognizant that "employment laws" cover not merely the actual period of employment, but the pre-employment stage, as well as, to some extent, the post-employment stage. And yes, an "adverse action" can take place at any stage.

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